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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 4[redacted]747

SHAW WAREHOUSE COMPANY, BIRMINGHAM ICE AND COLD STORAGE COMPANY, and BOGGS COLD STORAGE COMPANY,
Petitioners,

vs.

SOUTHERN RAILWAY COMPANY, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

REPLY BRIEF.

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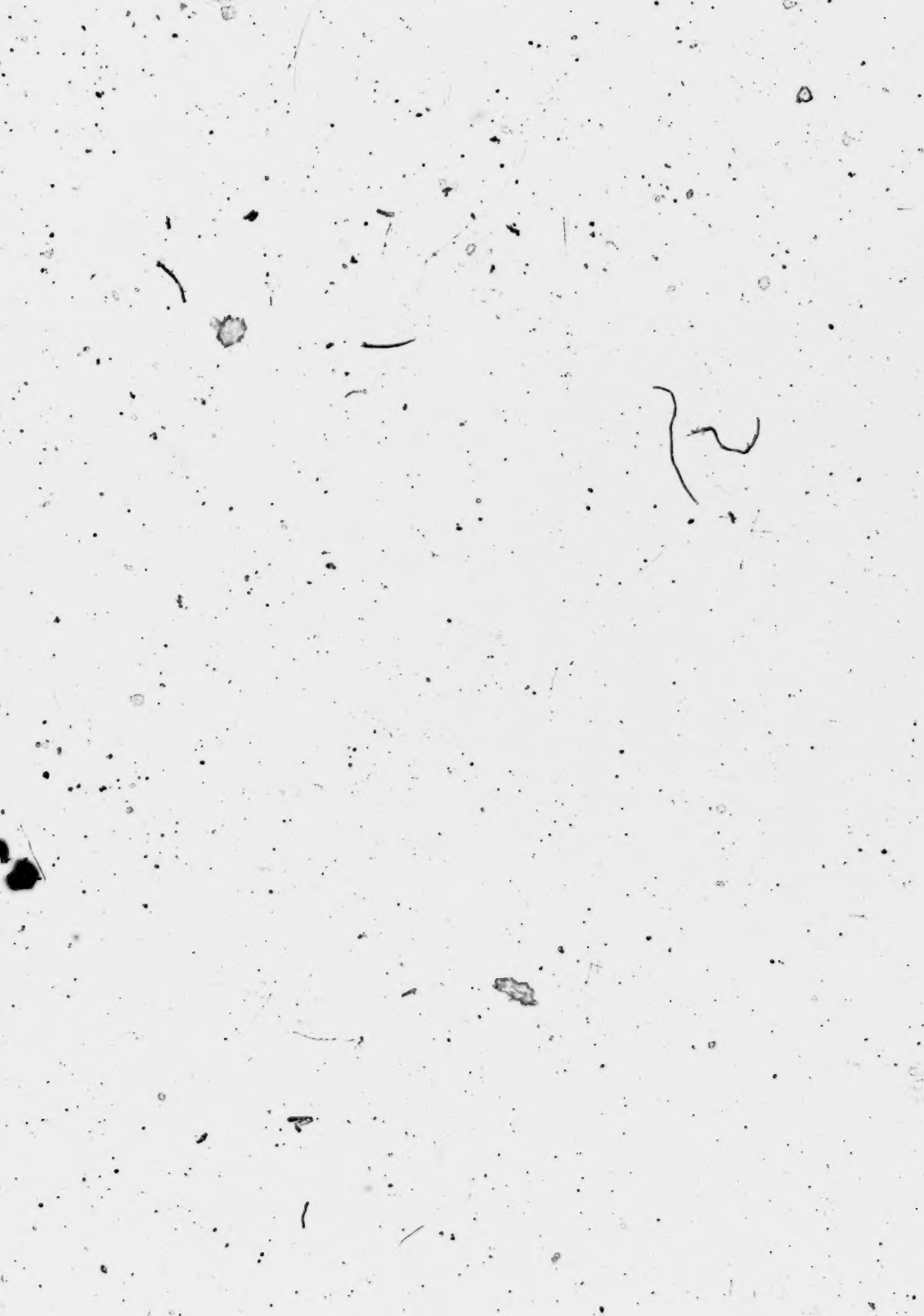

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 447.

SHAW WAREHOUSE COMPANY, BIRMINGHAM ICE AND COLD STORAGE COMPANY, and BOGGS COLD STORAGE COMPANY,
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vs.

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REPLY BRIEF.

Respondents' brief in opposition to certiorari accepts Petitioners' statement of the case. It neither significantly supports the opinion below nor really challenges the merits of either the petition or the dissent of Judge Brown. In the main it attempts to oppose by confession and avoidance.

However, the serious problems pointed out by Judge Brown's dissent, concerning the Court's prior decisions

on primary jurisdiction and the permitting of an indirect collateral attack on a final administrative decision, cannot be avoided by out of context, and outside the record, quotations of a small part of an argument before the trial court. Nor can the questions presented be avoided by unexplained assertions that none of the questions presented are really involved in this case, or, that the petition only challenges evidentiary findings under undisputed principles of law.

Neither the petition nor the dissent require any review of record. The legal issues which Respondents argue "are not involved" were, in fact, at the core of both the jury charge and the opinion below as the petition specifically demonstrates, and as the dissent repeatedly emphasizes. The courts below establish rules which, for the first time, permit railroads to subsidize shippers from freight revenues by extending credit in the rental or sale of facilities. The petition demonstrates that prior decisions of other Circuit Courts of Appeal, the Interstate Commerce Commission, and the Three-Judge Court say the opposite. Two opposing rules of law have been applied to identical contracts and practices. As Judge Brown exclaims, "Only one is right. Both may not be the law simultaneously." 294 F. 2d at 855 (Appendix at 53).

Respondents even ask the Court to assume that the jury ignored the obviously erroneous charge authorizing the exclusion from rents of depreciation (the recovery of construction costs). But under Anglo-American jurisprudence, as Judge Brown points out, "The law . . . must assume the erroneous charge induced the verdict." 294 F. 2d at 855 (Appendix at 53).

The most serious statement made by Respondents, and the statement that induced this reply, was the unexpected representation to the Court that the depreciation exclu-

sion charge was requested by the plaintiffs below (p. 7).[1] **This is not true.** Petitioners' requested charge expressly included depreciation as an element to be recovered in rents (R. 806):

> "When new facilities are constructed by a railroad and rented to tenants whose business includes the shipment or receipt of rail freight as owners or as consignees or consignors the total rental charged must not be less than an amount which will fully cover a fair return on that plus taxes, insurance, **depreciation** and maintenance and no such new construction should be undertaken unless there is assurance with all reasonable certainty that such rentals can and will be collected." (Emphasis supplied.)

The trial court modified this requested charge by a parenthetical supplementary oral comment as is clearly shown by the record:

> (And that's to be taken in connection with my previous instruction to you that if it is intended that the purchase plan be carried out you would strike from that the factor of depreciation in computing a compensatory rental.)

Respondents would have the Court believe that the trial court's comment was a part of Petitioners' requested written charge.

This comment, and its exclusion theory, was repeatedly and vigorously excepted to by Petitioners (R. 807, 808, 815-816, 819, 827, 828). This comment was the basis of

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[1] Southern expert J. J. F. Steiner excluded depreciation from his rental appraisal at the direction of Respondents' counsel (R. 689-690, 719-720). He said that his rental value appraisal was the most unique he had ever made—that the "extraordinariness and uniqueness is that I was asked to make an appraisal with no consideration for the recovery of depreciation" (R. 736, see R. 734-735).

ground 52 of Petitioners' motion for new trial (R. 861-864). And even when the jury specifically asked for the additional instructions on the "compensatory part" of the charge, the trial court would not even modify the charge to at least require financial ability of tenants such as Nelson Company to support a purchase intention to which the charge would assign such legal consequences (R. 820, 823-825). Respondents cannot now rewrite the record to support their argument.

Petitioners respectfully submit that for the reasons set out in their petition, a writ of certiorari should be granted as prayed.

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